Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12	)	
and 19 of the Cable Television	)	
Consumer Protection and	)	MM Docket No. 92-265
Competition Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS

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SUMMARY

One of Congress' goals in adopting the Cable Act of 1992 was to increase competition in the multichannel video programming market. While the success of any competitive video venture, including video dialtone, is dependent on a number of factors, one factor is critical -- access to programming. Without access to a wide range of programming on nondiscriminatory terms, the market for multichannel video programming will remain closed to new entrants. In implementing the Cable Act's provisions, the Commission should adopt rules which ensure that all multichannel video programming distributors have fair and equal access to programming.

U S WEST's comments on programming access are primarily directed at Commission inquiries on exclusive contracts and discrimination standards. U S WEST believes that parties proposing to enter into exclusive contracts should bear the burden of demonstrating that these contracts are in the public interest. As a general rule, exclusive contracts should be presumed to be contrary to the public interest. However, U S WEST believes that it is in the public interest to grant an exception to this general rule for limited term exclusive contracts for new program services.

In adopting a standard for discrimination, U S WEST believes that the Commission should employ a combination of its Options 1 and 2. Accordingly, U S WEST believes that the first

step in any discrimination analysis should be a determination of "likeness." Once "likeness" has been found, U S WEST recommends that the Commission employ a set of rebuttable presumptions in investigating complaints of unlawful discrimination. Satellite cable and satellite broadcast programming vendors establishing pricing matrices (i.e., schedules) which are applied uniformly to all similarly situated customers should be presumed to be in compliance with Section 628(c)(2)(B) of the Cable Act. Complainants claiming otherwise should bear the burden of proof.

Conversely, programming vendors choosing to establish prices, terms and conditions on an individual contract or per-sale basis should bear the burden of proving that any given price, term or condition is nondiscriminatory. Commission adoption of rules incorporating such rebuttable presumptions would serve the interests of all parties and allow for more efficient administration of the complaint process.

Lastly, with one exception, U S WEST supports the Commission's proposals on the contents of complaints and on the administration of the complaint process. The only exception is in cases where programming vendors do not offer programming under standard pricing arrangements. In such cases, complainants may be unable to plead their cases with specificity unless they are allowed to examine individual contracts. U S WEST believes that a reasonable solution to this problem is for the Commission to allow "pre-complaint discovery" similar to that allowed under Rule 27(a) of the Federal Rules of Civil Procedure.

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Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS

U S WEST Communications, Inc. ("U S WEST"),[1] through counsel and pursuant to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("Notice" or "NPRM"), released December 24, 1992, hereby files its comments on the Commission's implementation of Sections 12 and 19 of the 1992 Cable Act.[2]

I. INTRODUCTION

A. Background

Sections 12 and 19 deal with two major issues of concern to

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[1] U S WEST is a common carrier provider of exchange access and exchange telecommunications services.

[2] See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, Notice of Proposed Rule Making, FCC 92-543, rel. Dec. 24, 1992. See also Cable Television Consumer Protection and Competition Act of 1992, Public L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act of 1992" or "Cable Act") (to be codified at 47 U.S.C. § 628).

Congress when it adopted the Cable Act of 1992: 1) program carriage agreements between cable operators or other multichannel video programming distributors and video program vendors (Section 12 -- hereinafter referred to as Section 616);[3] and 2) access to programming (Section 19 -- hereinafter referred to as Section 628). Section 616 directs the Commission to adopt rules "that prevent multichannel programming distributors from entering into carriage agreements that condition carriage of a vendor's programming on particular concessions" (e.g., a financial interest in a program service; exclusive distribution rights; and restraints on a video programming vendor's ability to compete).[4] Section 628 is aimed at "increasing competition and diversity in the multichannel video programming market" and prohibits many activities and practices which would hinder or impede competition.[5] Many of Section 628's prohibitions are directed at vertically integrated cable operations where the different entities are affiliated (i.e., one entity has an "attributable ownership interest" in another).

B. U S WEST's Interest

U S WEST has been an active participant in the Commission's

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[3]"[T]he term 'video programming vendor' means a person engaged in the production, creation, or wholesale distribution of video programming for sale." See Cable Act of 1992, § 616(b).

[4]NPRM at ¶¶ 25-26.

[5]Id. at ¶ 6.

Video Dialtone proceeding[6] and is currently evaluating video dialtone service as a means of participating in the market for video entertainment. In the Video Dialtone proceeding, U S WEST observed that the market for video dialtone service was undefined even though there was a demonstrated market for video entertainment in the home.[7]

The Commission's video dialtone framework, as explained in the Video Dialtone Order,[8] differs significantly from the manner in which video entertainment is currently delivered to the home. Under this framework, telephone companies providing video dialtone service would sell access to end-user customers and transport and other services to video programmers. Contrary to current cable arrangements, video dialtone providers are restricted to a very limited ownership interest in video programmers "that are customers of, interconnect with, or share construction and/or operation of the common carrier [video dialtone] platform."[9] Cable operators have no such restrictions and have extensive ownership interests in cable networks (i.e.,

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[6]See In the Matter of TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266.

[7]See U S WEST Comments, CC Docket No. 87-266, filed Feb. 3, 1992, at 12.

[8]See generally TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd. 5781 (1992) ("Video Dialtone Order"), appeals pending sub nom. USTA, et al. v. F.C.C., No. 92-1404 (D.C. Cir. pet. for rev. filed Sept. 9, 1992).

[9]Video Dialtone Order, 7 FCC Rcd. at 5789 ¶ 14.

video programmers).

While the success of any video dialtone venture is dependent on a number of factors, one factor is critical -- access to programming.[10] Without access to programming, video dialtone providers will have nothing to offer consumers and the market for multichannel video programming will remain closed to new entrants.[11] Competitive alternatives to incumbent cable operators cannot develop if potential entrants cannot be assured access to a wide range of video programming on nondiscriminatory terms.

The Cable Act has limited access to programming for a period of time by exempting "exclusive distribution" contracts which were entered into on or before June 1, 1990. Nevertheless, the Commission still has great latitude in implementing the Cable Act's provisions on program access. U S WEST urges the Commission to adopt rules which will ensure that all multichannel video programming distributors have fair and equal access to programming.[12] Only in this way can the Commission fulfill its

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[10]"Ensuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable." Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 5021 ¶ 112 (1990) ("Cable Report").

[11]One of Congress' reasons for adopting Section 628 of the Cable Act of 1992 was "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market[.]" See Cable Act of 1992, § 628(a).

[12]If the Commission is uncertain, it should err on the side of equal access rather than protecting the status quo.

Congressional mandate to adopt rules to "increas[e] competition and diversity in the multichannel video programming market[.]"[13] With this goal in mind, U S WEST now responds to Commission inquiries on Sections 616 and 628 of the Cable Act of 1992.

II. THE CABLE ACT'S PROHIBITIONS AGAINST UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES APPLY EQUALLY TO CABLE OPERATORS, AFFILIATED SATELLITE CABLE PROGRAMMING VENDORS, AND SATELLITE BROADCAST PROGRAMMING VENDORS

In promulgating Section 628 of the Cable Act, Congress adopted provisions prohibiting cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors from engaging in unfair methods of competition or unfair or deceptive acts or practices.[14] In Section 628(c)(2), Congress also gave the Commission further direction on the minimum contents of regulations.[15] In this section, Congress specifically directed the Commission to adopt rules to prevent vertically integrated cable operators (i.e., cable operators with an attributable interest in satellite cable programming vendors or satellite broadcast programming vendors) and satellite broadcast vendors from engaging in certain practices.[16]

Section 628(c)(2) does not override or conflict with Section

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[13] Cable Act, § 628(c)(1).

[14] See id., § 628(b).

[15] See id., § 628(c)(2).

[16] See id.

628(b), it complements Section 628(b) and requires that at a minimum the Commission's rules must address certain specific practices which vertically integrated cable operators may engage in. Section 628(b)'s prohibitions apply to all cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors.

III. PARTIES WITH EXCLUSIVE DISTRIBUTION CONTRACTS SHOULD BE DEEMED TO HAVE AN "ATTRIBUTABLE INTEREST" IN EACH OTHER FOR CABLE ACT PURPOSES

In its NPRM, the Commission observes that it must first define what an "attributable interest" is before it can determine whether a cable operator has an attributable interest in a satellite cable programming vendor and whether certain provisions of the Cable Act apply.[17] The Commission seeks comment on the standard it should use to find an "attributable interest" and specifically asks whether its broadcast attribution rules[18] should be used.[19]

U S WEST believes the Commission's broadcast attribution rules are a reasonable standard to use for determining whether an "attributable interest" exists in most instances. However, if the Commission is to fulfill its Congressional mandate of increasing competition and diversity in the multichannel

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[17] NPRM at ¶ 9.

[18] 47 C.F.R. § 73.3555.

[19] NPRM at ¶ 9.

programming market, it must go beyond the broadcast attribution rules and find that the existence of an exclusive distribution contract between two parties is an "attributable interest" for Cable Act purposes. The inclusion of parties with exclusive distribution contracts in the definition of attributable interests will help to ensure that video programming is available to alternative providers (i.e., other than cable operators) in the multichannel video programming market.[20]

IV. EXCLUSIVE CONTRACTS

Use of contracts which contain exclusive distribution rights and other restrictive terms and conditions is widespread in the cable industry. While the Cable Act recognizes there may be situations where exclusive contracts are in the public interest, on the whole, the Cable Act's provisions indicate that Congress viewed exclusive agreements as barriers to entry and contrary to its competitive goals. As such, U S WEST believes that parties proposing to enter into exclusive contracts to provide video programming should bear the burden of demonstrating that these contracts are in the public interest.

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[20]In its Cable Report to Congress, the Commission found that "[m]ost cable operators have the ability to deny or unfairly place conditions on the access of most program services to the cable communities they serve, and evidence suggests that some have done so." See Cable Report, 5 FCC Rcd. at 4971-73 ¶ 13(7).

A. As A General Rule, Exclusive Contracts Should Be Presumed To Be Contrary To The Public Interest

Section 628 of the Cable Act references exclusive contracts in several sections -- prohibiting such contracts in some instances,[21] exempting them in other instances,[22] and allowing them in other limited cases.[23] Nowhere does Congress advocate the use of exclusive contracts to further its goals in adopting the Cable Act. On the contrary, use of exclusive contracts appears to be one of the barriers to achievement of Congressional goals. As such, it makes no sense for the Commission to adopt rules which favor parties entering into exclusive contracts and place the burden of proof on potential competitors and other parties which may be harmed by such agreements.

Therefore, U S WEST recommends that the Commission adopt a general rule which presumes that exclusive contracts are contrary to the public interest. The Commission should clarify that this presumption is rebuttable and that parties bear a high burden of proof in overcoming it.

B. As An Exception To The General Rule, Limited Term Exclusive Contracts For New Program Services Should Be Deemed To Be In The Public Interest

Both Congress and the Commission recognize that some programming services would not exist if exclusive contracts had

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[21] See Cable Act, § 628(c)(2)(C); § 628(c)(2)(D).

[22] See id., § 628(h)(1).

[23] See id., § 628(c)(4).

been prohibited in the past.[24] In its NPRM, the Commission states that:

> [I]t may be in the public interest to define, at the outset, a rule that would permit exclusive distribution contracts for new program services. Such contracts could be deemed to meet the public interest test of Section 628(c)(4) if they were limited to a specific duration, e.g., two years, that would facilitate the launch of the new service.[25]

U S WEST believes the Commission's proposal is a reasonable way of insuring that new programming services have an opportunity to attract necessary capital investment and to gain access to viewers. However, such exclusive contracts should be limited to two years duration. Contracts in excess of two years should be subject to a general rule which presumes that they are contrary to the public interest.[26] This would not prohibit exclusive contracts in excess of two years for new programming services; it would just shift the burden of proof.

C. Satellite Cable And Satellite Broadcast Programming Vendors Should Be Required To File A List Of All Exclusive Video Programming Contracts For A Given Area Upon Request From An Interested Party

In discussing exclusive contracts, the Commission inquires as to how it or any complainant would know if an exclusive contract violates the provisions of the Cable Act and what data

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[24]See NPRM at ¶ 36; Senate Comm. on Commerce, Science and Transportation, Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, 102nd Cong., 2d Sess. (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1161.

[25]NPRM at ¶ 36.

[26]See Section IV. A. above.

should be required to demonstrate a violation.[27] While these are important questions, a more important "threshold" question is what exclusive contracts are currently in existence between cable operators and video program providers for a given area. The answer to this question is of great importance to potential video dialtone providers and other possible entrants to the multichannel video programming market. It is not inconceivable that there may be little or no programming available to new market entrants in many local areas because of the existence of exclusive contracts.

At a minimum, satellite cable and satellite broadcast programming vendors should be required to reveal information on the existence of exclusive contracts for a given area upon request by an interested party (e.g., potential video dialtone providers). Not only would such a requirement preserve the limited resources of potential competitors, it would stimulate competition in those areas where programming is available. Programming vendors should be required to provide a list of all exclusive contracts that they or their affiliates are a party to in a given area which relate to the sale or distribution of video programming. Programming vendors should be required to provide the following information on exclusive contracts to interested parties:

- parties to the contract
- date of the contract
- effective date of the contract

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[27] See NPRM at ¶ 33.

- term of the contract
- subject matter of the contract (i.e., programming affected by the contract)
- geographic coverage of the contract
- prohibitions/restrictions on sales/relationship with third parties

Exclusive contracts should be defined as any contracts for the purchase/sale or distribution of video programming which affect the availability, and price terms and conditions of similar programming to third parties (i.e., not parties to the contract) or limit the sale of the programming within a geographic area to one party to the contract.

Adoption of a rule which requires disclosure of the existence of exclusive contracts by programming vendors will serve the public interest. Such a requirement will place little or no administrative burden on the Commission while giving potential competitors critical information on the availability of video programming.

V. DISCRIMINATION IN PROGRAMMING DISTRIBUTION

Section 628(c)(2)(B) prohibits discrimination by satellite cable programming vendors in which a cable operator has an attributable interest or by satellite broadcast programming vendors in the prices, terms and conditions of sale or delivery of video programming.[28] The Commission seeks comment on the type of standard it should adopt for discrimination and if it should employ a two-step analysis which analyzes whether discrimination,

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[28] See Cable Act, § 628(c)(2)(B).

once established, has prevented or hindered significantly any multichannel video programming distributor from providing programming to consumers.[29]

U S WEST does not believe a two-step analysis is either necessary or warranted. Section 628(c)(2)(B) prohibits discrimination with few exceptions;[30] discrimination is a per se violation of the Cable Act. A finding that a multichannel video programming distributor has been significantly hindered in providing video programming to consumers is not required and would serve no purpose other than to increase the burden of proof on complainants.

In adopting a standard for discrimination, U S WEST believes that the Commission should employ a combination of Options 1 and 2.[31] The first step in any discrimination analysis should be a determination of "likeness."[32] That is, is the satellite cable or satellite broadcast programming that a multichannel video programming distributor is purchasing or attempting to purchase, "like" programming purchased by another multichannel video programming distributor (e.g., cable operator). Satellite cable

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[29]See NPRM at ¶ 16.

[30]See Cable Act, § 628(c)(2)(B)(i)-(iv).

[31]Option 1 allows for a "reasonable" price differential depending on the factors delineated in Section 628(c)(2)(B) while Option 2 is a test similar to that used in Section 202(a) of the Communications Act. See NPRM at ¶¶ 20-21.

[32]See, e.g., ABC v. F.C.C., 663 F.2d 133, 138 (D.C. Cir. 1980); see also Ad Hoc Telecom. Users Com. v. F.C.C., 680 F.2d 790, 795-96 (D.C. Cir. 1982).

and satellite broadcast programming vendors should not be allowed to avoid a finding of likeness by unreasonably bundling or packaging video programming.[33]

If "likeness" is found and prices and terms and conditions differ, this would be sufficient to establish discrimination. The question of whether the discrimination is unlawful under Section 628(c)(2)(B) would then depend upon whether the differences in price, terms and conditions reflected differences in credit worthiness, costs, economies of scale, etc.[34] U S WEST believes that a reasonable and efficient approach to investigating complaints of unlawful discrimination, once "likeness" has been found, is for the Commission to adopt rules establishing rebuttable presumptions similar to those described below. Such an approach should allow complainants to get a fair hearing without placing an unreasonable burden of proof on either party to the complaint.

Satellite cable and broadcast programming vendors should be encouraged to develop pricing matrices (i.e., schedules) and identify reasonable customer classes that reflect differences in financial characteristics (e.g., credit worthiness, cost, quality, volume and other variables referenced in Section 628(c)(2)(B)(i)-(iv)). Satellite cable and satellite broadcast

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[33]Thus, while it might be reasonable to require that a multichannel video programming distributor purchase a complete series or season of a video program for a given market, it would probably be unreasonable to require the distributor to purchase a package of disparate programs.

[34]See Cable Act, § 628(c)(2)(B)(i)-(iv).

programming vendors establishing such matrices of prices, terms and conditions which are applied uniformly to all similarly situated customers and to all sales of video programming should be presumed to be in compliance with Section 628(c)(2)(B) of the Cable Act.[35] Complaints claiming discrimination in such instances should be dismissed unless complainants can show that the criteria, cost categories, customer classes and other attributes/characteristics of a programming vendor's pricing matrix are unreasonable.

Conversely, if a satellite cable or satellite broadcast programming vendor chooses to establish prices, terms and conditions on an individual contract or per-sale basis, the programming vendor should bear the burden of proving that any given price, term or condition is nondiscriminatory.[36] To do otherwise, would be to place an unfair and extremely high burden of proof on complainants and create an administrative burden on the Commission.

Commission adoption of rules incorporating the above rebuttable presumptions (and assignment of the burden of proof) would serve the interests of all parties. Programming vendors would be free to establish the prices, terms, and conditions

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[35]This matrix of prices, terms and conditions should be publicly available to all purchasers and potential purchasers of video programming.

[36]Refusals to deal, in the absence of an exclusive contract under Section 628(c)(2)(B)(iv), should be found to be a per se violation of Section 628(c)(2)(B)'s prohibition against discrimination.

associated with the sale of their programming. The increased use of standard pricing matrices by programming vendors would provide alternative multichannel video programming distributors with significantly more information on the availability of programming and would minimize the possibility of unlawful discrimination. Also, this approach should reduce the number of frivolous complaints and allow for more efficient administration of the complaint process.

In its NPRM, the Commission also concludes that it would be unwise to apply any pricing policies or standards to implement Section 628 on a retroactive basis.[37] U S WEST supports this conclusion and recommends that all affected parties be given one year from the adoption of a relevant Commission order to bring all existing contracts into compliance with Commission policies and standards. All new contracts or extensions/renewals entered into on or after the adoption of a Commission order should be required to be in compliance within 60 days of the release of a Commission Order.

VI. ENFORCEMENT

In its NPRM, the Commission proposes a complaint process which should minimize both the administrative burden on the Commission and the number of frivolous complaints.[38] With few exceptions, U S WEST supports the Commission's proposals.

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[37] See NPRM at ¶ 27.

[38] See id. at ¶¶ 38-49.

The Commission's proposal would require complaints to "set forth specific allegations of misconduct and include affidavits by knowledgeable persons, or other tangible evidence, to support each allegation made in the complaint."[39] U S WEST does not believe that this is an unreasonable requirement if a satellite cable or satellite broadcast programming vendor offers video programming under a standard pricing matrix, as discussed above in Section V. However, if programming vendors do not offer programming under such standard pricing arrangements, complainants may be unable to plead their cases with specificity. In such cases, examination of individual contracts is required in order to determine whether misconduct has occurred. Without the ability to examine contracts, complainants would be caught in a "catch 22" -- they would suffer harm but be unable to prove it.

A reasonable solution to this problem is for the Commission to allow "pre-complaint discovery" similar to that allowed under Rule 27(a) of the Federal Rules of Civil Procedure.[40] This would allow parties alleging misconduct to determine whether there is any basis for a complaint in those cases where video programming is provided under unique contracts rather than standard pricing matrices.

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[39] Id. at ¶ 40.

[40] See Fed. R. Civ. P. 27(a).

VII. CONCLUSION

U S WEST urges the Commission to adopt rules on access to video programming which incorporate the above proposals. By doing so, the Commission can increase competition among multichannel video program distributors and the diversity of programming available to the public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Noelle K. Dormio, do hereby certify on this 25th day of January, 1993, that I have caused a copy of the foregoing **COMMENTS** to be hand delivered to the persons named on the attached service list.

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